

1
2 7.2.1 On a monthly basis, each Party will record its originating minutes of use
3 including identification of the originating and terminating NXX for all
4 intercompany calls.

5
6 7.2.2 Each Party will transmit the summarized originating minutes of use from
7 Section 7.2.1 above to the transiting and/or terminating Party for
8 subsequent monthly intercompany settlement billing.

9
10 7.2.3 Bills rendered by either Party will be paid within 30 days of receipt
11 subject to subsequent audit verification.
12

6.1 For interLATA traffic and intraLATA traffic, compensation for termination of
intercompany traffic will be at access rates as set forth in each Party's own applicable
interstate or intrastate access tariffs. When such traffic is contained in Optional Calling
Areas, compensation will be applied pursuant to Section 5.0 above.

6.2 The Parties will establish MPB arrangements in order to provide Switched Access
Services to Interexchange Carriers via a Party's access tandem switch, in accordance with
the MPB guidelines adopted by and contained in the Ordering and Billing Forum's
MECOD and MECAB documents. Except as modified herein, MPB will be determined
during joint network planning.

6.3 The Parties will maintain provisions in their respective federal and state access tariffs, or
provisions within the National Exchange Carrier Association (NECA) Tariff No. 4, or
any successor tariff, sufficient to reflect this MPB arrangement, including MPB
percentages.

6.4 As detailed in the MECAB document, the Parties will exchange all information necessary
to accurately, reliably and promptly bill third parties for Switched Access Services jointly
handled by the parties via the MPB arrangement. The Parties will exchange the
information in Exchange Message Record (EMR) format, on magnetic tape or via a
mutually acceptable electronic file transfer protocol. Where the EMR records cannot be
transferred due to a failure of the Connect: Direct, records can be provided via magnetic
tape, under the specifications contained in Attachment 4: Connectivity Billing and
Recording. The initial billing company (IBC) will provide the information to the
subsequent billing company within ten (10) working days of sending the IBC's bills.

6.5 Initially, billing to interexchange carriers for the Switched Access Services jointly
provided by the parties via the MPB arrangement will be according to the multiple bill
single tariff method. As described in the MECAB document each Party will render a bill
in accordance with its tariff for its portion of the service. Each Party will bill its own
network access service rates to the IXC. The residual interconnection charge (RIC), if
any, will be billed by the Party providing the End Office function. However, For ISDN
Interconnection, SWBT will bill for Tandem Switching, Transport and End Office
Switching and will remit CLEC's portion to CLEC as described in Attachment 25.

6.6 MPB will also apply to all jointly provided traffic bearing the 900, 800 and 888 NPAs or
any other non-geographical NPAs which may likewise be designated for such traffic
where the responsible party is an IXC.

6.7 Traffic delivered to the other Party over ISDN Interconnection. Jointly
Provided access over ISDN Interconnection is governed by the terms,
conditions and prices set out in Attachment 25 - ISDN Interconnection.

1 7.2.4 Detailed technical descriptions and requirements for the recording, record
2 exchange and billing of traffic are included in the Technical Exhibit
3 Settlement Procedures (TESP), a copy of which has been provided to
4 CLEC by SWBT.

5
6 7.3 MOUs for the rates contained in this Attachment will be measured in
7 seconds by call type, and accumulated each billing period into one minute
8 increments for billing purposes in accordance with industry rounding
9 standards.

10
11 7.4 Each Party will multiply the tandem routed and end office routed
12 terminating MOUs by the appropriate rate contained in this Attachment to
13 determine the total monthly billing to the other Party.

14
15 7.5 Through July 31, 1998, if the percentage of calls passed with CPN is
16 greater than ninety percent (90%), all calls exchanged without CPN
17 information will be billed as either Local Traffic or IntraLATA Toll
18 Traffic in direct proportion to the minutes of use (MOU) of calls
19 exchanged with CPN information. Effective August 1, 1998, if the
20 percentage of calls passed with CPN is less than 90%, all calls passed
21 without CPN will be billed as IntraLATA Toll Traffic.

22 These provisions require originating records, as § 7.2.1 and 7.2.2 make clear. Attachment
23 12 § 7.1 says that originating records must be used for the matters covered in §§ 7.1-7.5. Section
24 7.2.2 says that the originating party will transmit originating records and that the terminating
25 party will use those records as the basis for the bill. The "no CPN" provision is § 7.5, so any "no
26 CPN" charges must necessarily be based on originating records.

27 **Q: HOW DOES AT&T JUSTIFY ITS USE OF TERMINATING RATHER THAN**
28 **ORIGINATING RECORDS?**

29 A: AT&T' response to UTEX's RFI No. 1-8, and the documents produced along with the
30 response to RFA No. 1-1 (D33323 NC RFA 1-1-1 and D33323 NC RFA 1-1-2), and AT&T'
31 September 19, 2007 Supplemental Response to UTEX's RFI No. 1-8 (page 4 of 6) indicate that

1 AT&T believes a decision in a later case in which UTEX was not a party⁷⁹ somehow served to
2 automatically amend the contract terms. This cannot be so. GTC § 18.1⁸⁰ prohibits amendment
3 without consent in writing. Further, under both the Communications Act § 252(e) and PUC Proc.
4 R. 21.101, any amendments must be submitted to the Commission for approval and are not
5 effective or binding without such approval. The current ICA was not amended to provide for
6 billing based on terminating records, so AT&T cannot unilaterally bill based on terminating
7 records. The Commission so held in the *Tex-Link* case.

8 **Q: BUT DID DOCKET 21982 SOMEHOW REQUIRE AN AMENDMENT TO THE**
9 **CURRENT AGREEMENT?**

10 A: No. The bargained for language of Attachment 12 Section 1.4.1 came immediately prior
11 to Docket 21982 so Waller Creek had no reason to participate. Waller Creek already had its

⁷⁹ The case on which AT&T relies is Docket 21982, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*. The Commission made it clear in several orders that it was not addressing all carriers – only those that specifically sought arbitration by filing a petition would be parties and bound by the decision. *See*, Docket 21982, Order No. 1 (Jan. 14, 2000) [first paragraph and note 2]; Order No. 3 (Jan. 25, 2000); Order Approving Revised Arbitration Award, As Modified (Nov. 15, 2000) [“Accordingly, SWBT and any CLEC that has requested arbitration of the issue of inter-carrier compensation in this proceeding pursuant to § 252 of the FTA shall incorporate the rates approved in the Revised Award in any interconnection agreement”]; Final Order Approving Interconnection Agreements And Approving Implementing Language (Mar. 5, 2001, p. 2 [“The Commission limited participation in this docket to only those parties arbitrating the issue of reciprocal compensation in this proceeding”]. Neither Waller Creek nor UTEX were parties and no amendment to the WCC agreement or the agreement between UTEX and AT&T was submitted to the Commission for approval in Docket 21982.

⁸⁰ 18.1 Except as otherwise provided in this Agreement, no amendment or waiver of any provision of this Agreement and no consent to any default under this Agreement will be effective unless the same is in writing and signed by an officer of the Party against whom such amendment, waiver or consent is claimed. In addition, no course of dealing or failure of a Party strictly to enforce any term, right or condition of this Agreement will be construed as a waiver of such term, right, or condition. By entering into this Agreement, the Parties do not waive any right granted to them pursuant to the Act; however, the Parties enter into this Agreement without prejudice to any positions they have taken previously, or may take in the future in any legislative, regulatory or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

1 answer for all Internet traffic and more broadly all ESP traffic; there would be no compensation
2 due regardless of origin or direction. I bargained for this certainty on behalf of WCC and gave
3 consideration for it by foregoing other rights in return. No amendment to the WCC agreement or
4 the agreement between UTEX and AT&T was required, even with regard to the records to be
5 used for billing, because there was to be no such billing. AT&T seems to have agreed that no
6 amendment was required because it never invoked any kind of change of law demand for an
7 amendment with either WCC or UTEX to move from originating to terminating records. That
8 case has absolutely no impact on our contract – other than supporting the proposition that
9 originating records are required under the current terms.

10 **Q: HAS AT&T EVER ASSERTED THAT ORIGINATING RECORDS MUST BE**
11 **USED UNTIL THERE IS AN AMENDMENT AUTHORIZING USE OF TERMINATING**
12 **RECORDS WHEN THERE ARE GOING TO BE INTERCARRIER COMPENSATION**
13 **BILLINGS BETWEEN AT&T AND A CLEC?**

14 A: AT&T has insisted in at least one prior case that until contract terms permit use of
15 terminating records then only originating records may form the basis for intercarrier billings
16 unless the parties agree otherwise. *See, Docket 22247, e.spire Complaint Against Southwestern*
17 *Bell Telephone Company Seeking Payment of Payment for Transport and Termination of Local*
18 *Traffic, SWBT Response to Complaint, pp. 2, 3, 8, 9, 10, 11, 13, 14, 15, 16, 17. See the Exhibit*
19 *which is this complaint.*

20 **Q: HAS THE COMMISSION RECOGNIZED THAT ICA TERMS REQUIRING**
21 **ORIGINATING RECORDS MUST BE AMENDED BEFORE TERMINATING**
22 **RECORDS MAY BE USED?**

1 A: The Commission's Docket 21982 Award recognized the binding nature of clauses
2 requiring originating records, because it ordered the carriers that did participate to file
3 amendments that, among other things, permitted use of terminating records for the first time and
4 only on a going forward basis.

5 **Q: WAS AT&T AWARE THAT UTEX TOOK THE POSITION THAT NO**
6 **RECORDS MUST ACTUALLY BE TRANSMITTED WHEN THE TRAFFIC IS ESP**
7 **TRAFFIC BECAUSE OF THE "NO COMPENSATION" CLAUSE?**

8 A: AT&T has known or should have known since before UTEX ever began to exchange
9 traffic that UTEX would treat all ESP traffic designated by our customers as no compensation,
10 and therefore there was no need to send any originating records. UTEX has never agreed to treat
11 traffic to and from enhanced service providers as "IXC" traffic or subject to any inter-carrier
12 compensation mechanism besides "no compensation." I communicated our position on this issue
13 long ago. For example, on June 22, 2005, in November 2003, in May 2004, in September 2004 I
14 described our position pictorially (in the call-flow diagrams that were attached to the email) and
15 in writing and orally. UTEX has followed the unique terms in our contract by treating each ESP
16 Customer as an end user in the LATA where the ESP has Situs.

17 I sent Jerry Gilmore an email on May 13, 2004 and followed with e-mails on May 25 and
18 June 3 in 2004 that clearly sets out our position on compensation for all traffic to and from ESPs.
19 See *EXHIBITS* referenced as emails to and from Gilmore. These e-mails were before any traffic
20 was passed between the companies. Then for over one year the parties exchanged traffic. AT&T
21 never requested or demanded that UTEX provide originating records. Prior to the current billing
22 dispute for both "No CPN" and "Access Charges," on June 22, 2005, I sent Debbie Josephson an

1 e-mail with Call Flow Rating and Routing examples showing exactly how UTEX rates and
2 routes each and every type of call we handle.

3 UTEX anticipates that AT&T may complain that UTEX has not sent any originating
4 records so it has the right to unilaterally bill based on terminating records. The contract
5 completely forecloses this kind of self-help because it provides an alternative method (PLU,
6 addressed below) and a path for dispute resolution. Unilateral action is not allowed. If AT&T
7 wanted to disagree with the fact we were not sending originating records, then they could have
8 told us they wanted us to do so. If the parties could not work it out, then AT&T was always free
9 to file a post-interconnection dispute resolution complaint. To date, AT&T has not requested
10 originating records from UTEX.

11 If AT&T believes some compensation is due, then its contractual duty is to seek to have
12 UTEX send originating records, which would then be the basis for any bills AT&T believes are
13 proper. If UTEX were to refuse any such request, then AT&T would have the right to invoke
14 dispute resolution and, if necessary, seek an order from the Commission requiring UTEX to
15 deliver any required originating records that AT&T would then use for billing. This is the
16 process that is expressly and exclusively required by Attachment 12 §§ 7.1-7.5. AT&T must use
17 that process: it cannot just start sending bills based on a method not contemplated by the
18 agreement and then complain that it is not getting paid.⁸¹ The Commission applied this rule in
19 *Tex-Link*.

20 AT&T knows what these provisions mean and has implicitly accepted that they mean
21 what we say they. If the words meant what AT&T now says they mean, we would not have been
22 at odds over AT&T's efforts as part of the Docket 26381 arbitration to secure different terms that

⁸¹ *Tex-Link, supra*.

1 move to the very regime it now claims already applies. UTEX has been opposing AT&T' on this
2 very issue for more than 6 years. AT&T apparently believes that Docket 26381 was never
3 abated, but has instead concluded and AT&T prevailed on every issue. But that is not what has
4 happened. Docket 26381 has been abated over our objection. The old terms are still in place.
5 Those terms govern until they are changed.

6 **Q: DOES THE ICA PROVIDE A FALLBACK IN THE EVENT THE ORIGINATING**
7 **RECORDS APPROACH DOES NOT SUFFICE?**

8 A: Yes. Even if the contract could somehow be interpreted to allow variance from the
9 originating records required by Attachment 12 §§ 7.1-7.5, it cannot reasonably be read to allow
10 AT&T to unilaterally decide what kind of alternative records will be used. Nor can the contract
11 reasonably be read to allow AT&T to unilaterally decide how to measure or identify and bill for
12 any traffic types to which AT&T believes it is entitled to recover inter-carrier compensation.

13 If for some reason the originating records requirement was no longer required or feasible
14 and a transition to some other process is arguably allowed or necessary, then the contract still
15 requires the parties to negotiate in good faith to try to reach an agreement on the specifics of the
16 replacement process, absent a Commission order that binds the two parties and specifying the
17 alternative process. GTC §§ 9.3, 36.1, 43.1. UTEX has most certainly not agreed to the specific
18 methods AT&T chose to try to impose. There cannot be any doubt that UTEX and AT&T are
19 "unable to agree upon a measurement and billing method." Accordingly, under Attachment 12, §
20 7.1 the PLU supplied to AT&T by UTEX is contractually required to be used "for the purposes
21 of measurement and billing."⁸² UTEX has consistently supplied a 100% PLU to AT&T –

⁸² This ICA provision regarding recourse to percent usage factors incorporates the PUC's substantive interconnection rules. See PUC Subst. R. 26.272(d)(2)(G). The current rule's percent usage requirement was carried forward from the original interconnection rule – the former PUC

1 meaning that there is no intraLATA or interLATA traffic to be billed, and all traffic is subject to
2 the compensation pricing set out in Attachment 12 §§ 1.4 and 1.4.1, using the bargained for
3 language in Attachment 12 §§ 1.2 and 1.2.1 rather than some other intercarrier regime or prices.
4 See Attached Exhibits.

5 AT&T has accepted the PLU and never took issue with that number. AT&T must apply
6 that PLU, unless and until AT&T goes through the audit process "associated with the PLU
7 method" and if that does not resolve the issue, invokes dispute resolution for informal
8 negotiations and then, if necessary, formal dispute resolution. See Attachment 12, § 7.1. AT&T
9 cannot engage in self-help and simply send bills based on a proprietary and – until now – mostly
10 unexplained billing system that AT&T internally manufactured on a continually evolving basis
11 during 2003-2007.⁸³ Attachment 12 §§ 7.0-7.5 directly addresses how adjustments are to be
12 made, and prohibits AT&T from unilaterally imposing a new and different process and method
13 unless and until the contract terms are amended or replaced.

14 UTEX's Request for Admission No. 1-2 in this case addressed this issue:

15 **RFA No. 1-2**

16 Please admit or deny that AT&T AT&T invoices related to alleged "no" or
17 "invalid" CPN and for "interLATA access" are not based on application of a PLU
18 submitted by UTEX to AT&T.
19

Subst. R. 23.97(d)(2)(G) – that was in effect at the time the Waller Creek agreement was arbitrated and approved.

⁸³ Exhibit 279 contains recent Admissions by AT&T in the ongoing federal court litigation demonstrating that AT&T's new and ever changing billing system is specifically designed to bill access charges for all traffic to and from Skype, Vonage, Free World Dial-up, and every other current VoIP/Internet Enabled Voice application that UTEX desires to support. AT&T's assertions of fraudulent misrouting of IXC traffic is nothing but smokescreen; AT&T has finally admitted that the dispute is not at all about Legacy IXC "misrouting" but instead relates to AT&T's decision that – notwithstanding the "no compensation for ESP traffic" provision in the current ICA – AT&T is entitled to access charges for Internet traffic. AT&T is really claiming that VoIP providers are IXCs and therefore the "no compensation" terms do not apply.

1 Answer: Subject to and without waiving AT&T' objections filed on August
2 27, 2007, AT&T provides the following response:

3
4 Deny. Attachment 12: Compensation section 7.5, which governs the billing
5 for no-CPN traffic, does not require the use of a Percent Local Usage ("PLU") but
6 simply states that such traffic will be billed as intraLATA Toll Traffic. Separately,
7 in reference to the "interLATA access" -- Attachment 11: NIA section 1.3, allows
8 UTEX to route interLATA and intraLATA over the same physical facilities as
9 local traffic, provided such routing is not for purposes of avoiding access charges.
10 As such, PLU has no bearing relative to the ICA's requirement to assess the
11 appropriate access charges on interLATA traffic terminated over the same
12 physical facilities as local traffic.

13 AT&T purported to "deny" that it had not used the PLU, but it is clear from the narrative
14 that indeed it did not use a PLU for billing purposes, because AT&T contends that the PLU
15 provision does not apply.

16 The PLU provision and the "no-CPN" billing provision are both in Section 7 of
17 Attachment 12. The "measuring and billing procedures" described in § 7.1 obviously apply to
18 any "no CPN" charges that may be authorized by § 7.5, because 7.5 is part of section 7 and does
19 not state otherwise or provide for different procedures. Similarly, § 7.1 expressly provides that
20 "[i]n any circumstance not addressed in those Sections (referring to §§ 7.1 - 7.5), or where the
21 Parties are unable to agree upon a measurement and billing method, the Parties will report the
22 Percentage Local Usage (PLU) to each other for the purposes of measurement and billing for
23 Local Traffic as defined in Section 1.2."

24 Attachment 12 § 7.1 says that originating records must be used for the matters covered in
25 §§ 7.1-7.5. The "no CPN" provision is § 7.5, so any "no CPN" charges must necessarily be based
26 on originating records. Where there are circumstances not covered by §§ 7.1-7.5 or where there
27 is a disagreement over the measurement and billing method, then the PLU conclusively governs
28 unless and until AT&T uses the audit, and if necessary the dispute resolution process, to obtain a
29 different PLU or a new method for measurement and billing. The PLU therefore applies as a

means to determine the amount of traffic that is "local" under § 1.2. Because UTEX submitted a 100% PLU, all traffic is "local" and none can be deemed to be interLATA. Since 100% of the traffic is "local" there can be no "interLATA access."

If originating records are not the sole method, then the only alternative is application of the 100% PLU supplied by UTEX. This is a direct application of Attachment 12 §§ 7.0-7.5. AT&T has used neither originating records nor the PLU as the basis for its billings. AT&T's billings are not consistent with the ICA.

Below is a list of the Documents I use in this section of my Testimony by Exhibit Number followed by a pictorial reference to the UTEX Exhibit list on these issues:

<u>Exhibit No.</u>	<u>Date</u>	<u>Email From</u>	<u>Topic</u>
324	4/6/2000	Josephson, Debbie (SWBT)	RE: UTEX~routing question
353	6/16/2000	Josephson, Debbie (SWBT)	UTEX~CIC codes
354	6/16/2000	Brett Nemeroff	
355	6/17/2000	Clifford, Joan A (SWBT)	RE: UTEX~CIC codes
356	6/17/2000	Josephson, Debbie (SWBT)	UTEX~CIC codes
			FW: Tandem Routing/possible access avoidance
406	4/3/2001	Stalnaker, Paul (SWBT)	
407	4/6/2001	Josephson, Debbie (SWBT)	RE: CMD5 Files
408	4/6/2001	Kenney, Carol S (SBCSI)	RE: CMD5 Files
409	4/10/2001	Stalnaker, Paul (SWBT)	Sample of UTEX traffic from 04-11-2005
			RE: 0300/DAU - DIAL AROUND TELECOM, INC test calls
412	4/18/2001	Stalnaker, Paul (SWBT)	UTEX Technical Contact Numbers
431	5/3/2001	Herrera, David (SWBT)	
432	5/3/2001	Stalnaker, Paul (SWBT)	RE: UTEX Technical Contact Numbers
439	5/10/2001	Herrera, David (SWBT)	RE: UTEX Technical Contact Numbers
440	5/10/2001	Herrera, David (SWBT)	RE: UTEX Technical Contact Numbers
441	5/10/2001	Herrera, David (SWBT)	RE: UTEX Technical Contact Numbers
444	6/1/2001	Josephson, Debbie (SWBT)	UTEX~Access over Local project
445	6/1/2001	Josephson, Debbie (SWBT)	UTEX~Access over Local project
448	6/5/2001	Lowell Feldman	RE: UTEX~Access over Local project
			Declined: UTEX~Internal conference call to discuss access over local issue
449	6/5/2001	Boyce, Amie M (AIT)	SBC Draft Response Ltr on AOL, SS7-B-Links, IXE, ISDN
450	6/5/2001	Herrera, David (SWBT)	
454	6/9/2001	Josephson, Debbie (SWBT)	RE: UTEX~Access over Local trunks
455	6/9/2001	Josephson, Debbie (SWBT)	RE: UTEX~Access over Local trunks
			FW: Routing and Rating Treatment of New Technology Traffic
478	6/21/2001	Lowell Feldman	

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481	6/27/2001	Josephson, Debbie (SWBT)	FW: Routing and Rating Treatment of New Technology Traffic
503	8/3/2001	Stalnaker, Paul (SWBT)	FW: CPN technical call
504	8/3/2001	Cole, Bill	CPN technical call
			Petition to FCC on fraudulent Phantom traffic issues in the industry
523	8/10/2001	SBC	RE: CPN technical call
524	8/11/2001	Cole, Bill (SBCSI)	RE: CPN technical call
526	8/11/2001	Jones, Jennifer (PB)	RE: CPN technical call
529	8/17/2001	Stalnaker, Paul (SWBT)	UTEX CPN/AOL Issue
530	8/17/2001	Jones, Jennifer (PB)	RE: TXD26381 UTEX Proceeding Dismissal
652	5/2/2002	Josephson, Debbie (SWBT)	3 minute study update
662	6/4/2002	Cole, Bill (SBCSI)	FW: UTEX Inertia Billing Disputes
670	7/12/2002	Boyce, Amie M (ASI-AIT)	UTEX - 3 MIN STUDY
676	7/17/2002	Ward, Reba K (SBCSI)	FW: files
677	7/19/2002	Boyce, Amie M (ASI-AIT)	RE: UTEX validation - January 11, 2007 BI and AMA data
727	2/12/2003	Andrews, Peter M (ATTSI)	UTEX validation - January 11, 2007 BI and AMA data
728	2/13/2003	Andrews, Peter M (ATTSI)	RE: UTEX
739	5/30/2003	Faustmann, Daniel K (ATTSI)	RE: UTEX
740	5/30/2003	Hobbs, Carolyn (ATTSWBT)	Docket No. 22247, Southwestern Bell Telephone Company's Response to the Complaint Filed by E.Spire Communications, Inc. and Southwestern Bell Telephone Company's Counter Complaint Against E.Spire Communications, Inc.
275			May 13, 2004 email from Lowell Feldman to Jerry W. Gilmore and Debbie Josephson; May 25, 2004 email from Lowell Feldman to Jerry W. Gilmore; and June 3, 2004 email from Lowell Feldman to Jerry W. Gilmore
276			June 22, 2005 email from Lowell Feldman to Debbie Josephson and attachments
277			PLU Submissions
278			AT&T Texas' Responses and Objections to UTEX Communications Corp.'s First Request for Admissions in Civil Case No. 07-CV-435-LY styled Southwestern Bell Telephone L.P., dba AT&T Texas vs. UTEX Communications Corp.; In The U.S. District Court, Western District of Texas, Austin Division
279			SWBT/SNET/PB/NB - CLEC Interconnection Trunk Forecast
280			Attachment 25: Integrated Services Digital Network Interconnection Methods
281			August 11, 2005 email from Bill Cole to Wayne Heinmiller
282			

SECTION 10: Bad Faith Negotiation (96) and Conclusions on VOIP Traffic

- 96 **Has AT&T Texas refused to negotiate the issue of proper routing and rating of traffic?**
- 97 **Can a VoIP provider be an "Enhanced Service Provider" or an "Internet Service Provider" as defined in the ICA? (Addressed only if AT&T Texas may challenge status)**
- 98 **Is VoIP an enhanced service?(Addressed only if AT&T Texas may challenge status)**
- 99 **Is VoIP an information service? (Addressed only if AT&T Texas may challenge status)**
- 100 **Can a VoIP call that originates and/or terminates on the PSTN still be enhanced if the VoIP services otherwise meets the definition of "enhanced service" at 47 C.F.R. § 64.702(a) or "information service" in 47 U.S.C. § 153(20)? (Addressed only if AT&T Texas may challenge status)**

Q: WHAT DO YOU ADDRESS IN THIS PART OF YOUR TESTIMONY?

A: This Final Section of my Testimony has my summary conclusions and also addresses DPL Items 96 through 100.

As shown above AT&T has refused to negotiate in good faith in dealing with UTEX on how to treat all new technology for routing and rating. The natural question to ask is why? The next natural question to ask is what would have happened if AT&T had negotiated in good faith.

AT&T produced in its answers to discovery many things. One thing they produced is a clear acknowledgement of great concern that if UTEX got its way on routing and rating of VOIP, and established clearly that calls to and from new technology providers are not to be treated as ordinary Long Distance, that the entire industry will be affected. AT&T is not concerned with a new rule or law change, but is concerned with how to get out of having to honor the terms of our agreement, how to get out of applying the intent of the agreement with respect to treatment of traffic to and from ESPs and is trying to get out of having to implement the intent of the Act

1 AT&T is correct in its assessment of UTEX regarding the change we will bring. If UTEX
2 is merely allowed to compete using the rights expressed in the Act and the ICA, we will change
3 the market.⁸⁴

4 The result will be clearly that AT&T will lose revenue because these new technology
5 providers and users would have competitive choices not currently available to them. In fact,
6 UTEX's "novel approach" was important enough financially to AT&T to be mentioned in the
7 same breath with \$30 million monthly recurring revenue disputes with the likes of Verizon and
8 Sprint.

9 But just trying to win business from AT&T is not what UTEX is doing. Yes, UTEX is
10 building a business to serve a new type of customer. And yes, we want to make money and profit
11 from serving this type of customer. But that really is not at the heart of our disputes.

12 This new type of customer (which in our mind is anything and everything "Internet,") in
13 our opinion, is already more important to society from a communications policy perspective than
14 any thing our regulators should try and protect related to the Legacy Public Switched Telephone
15 Network. UTEX's business plan is basically to protect these new technology users so that AT&T
16 may no longer *arbitrage* the *network effect*⁸⁵ of all inter-model communications for its own ill-
17 gotten gains at the expense of consumers, entrepreneurs, innovators and the U.S. economy. Just
18 as calls to the Internet were not allowed to be "gamed" by CLECs for ill-gotten profits,⁸⁶ calls

⁸⁴ The same concept of utilizing the rights an entrant has to create a market changing was in fact successful 10 years ago with the initial WCC business plan. UTEX's business plan is actually much broader and more ambitious than the original WCC plan.

⁸⁵ A "network effect" is a characteristic that causes a good or service to have a value to a potential customer which depends on the number of other customers who own the good or are users of the service. Definition from Wikipedia http://en.wikipedia.org/wiki/Network_effect

⁸⁶ Which is the effective result from the *ISP Remand* and the express intent of our arbitrated language and bargained for language in our existing ICA with AT&T. "No Compensation" means "No Gaming" – by either side.

1 from the Internet should not be "gamed" by the monopolies of old technology for profits they
2 have not earned.

3 While discussions on the merits of new technology in communications generally focus on
4 the importance of the enabled services and applications, they generally give substantially less
5 emphasis to the importance of the positive externalities brought about by the network effects
6 themselves and by the positive gains to society created when different networks are
7 "Interconnected" for the mutual exchange of traffic. The potential impact of the positive
8 externalities of network effects, however, has not been lost on AT&T. In an effort to exert and
9 extend its monopolistic control over consumers and Internet application providers, AT&T is
10 currently waging war on both unique applications and the positive network effects associated
11 with interconnecting new technologies with old.

12 Our case has been about exposing the truth of AT&T's affirmative attack on the industry.
13 AT&T has finally revealed, in this case, its anti-competition, anti-innovation and anti-consumer
14 position that pure VoIP applications such as Vonage and cable modem VoIP are subject to
15 access charges. In support of its erroneous position, AT&T is currently exploiting the fact that
16 many VoIP providers have chosen, for ease of interoperability, to emulate PSTN number
17 representation.⁸⁷ Probably because AT&T said they had to – or forced the CLEC that supplies
18 the PSTN connection to say they had to.

19 This, however, is of less long-term economic and policy concern for our country than the
20 attack AT&T and other ILECs are mounting on the positive externalities of the network effect.⁸⁸

⁸⁷ AT&T is saying that the number representation in the Signaling System 7 CPN parameter is determinative for the wholesale billing relationship as between CLECs and ILECs. This means that Vonage doesn't owe the money directly, but that Vonage's provider does.

⁸⁸ When AT&T cooperatively works with another ILEC, in this instance Consolidated Communications, the terms are express and clear, like in their 2006 agreement filed at this

1 Ultimately, AT&T's design is to make all communication with the PSTN require a unique 10
2 digit phone number issued by the North American Numbering Plan Administrator ("NANPA")
3 to a regulated carrier, or such communications will *summarily be deemed fraudulent*. In the
4 Internet voice world this is the equivalent of the Postal Service requesting that all e-mail servers
5 must be "hosted" by the local post office where users must pay to log on and check e-mail. In
6 essence, AT&T wants to prevent new technology use unless it can directly profit from it.

7 In a modern understanding of networks, the underlying physical network is differentiated
8 from the logical network primarily by multiplicity: for every network of N users, there are an
9 exponential number of possible logical networks. The collection of these networks encapsulates
10 the total number of possible sub-groupings of users at the application level. Recent developments
11 in technology manifested through Internet applications such as Facebook and MySpace have
12 provided new modes of interaction and *direct user control* of network appearances that are
13 allowing users to actualize previously inaccessible sub-groupings at an accelerating rate.⁸⁹ The
14 term "Group Forming" is used to describe this phenomenon, and such networks are referred to as
15 Group Forming Networks ("GFN").⁹⁰ The theory of Group Forming Networks provides an
16 elegant and powerful description of all possible modes of communication within and between

Commission. All ESP traffic is to be treated as ordinary long distance. Each ILEC is responsible for passing "unaltered" CPN and CPN is properly limited to when it comes from a Legacy ILEC End Office. Since these ILECs both agree they want to bill new technology for their own gain, their language works for them. UTEX has no such language, and is literally fighting to the death in this case to not have such results forced upon us.

⁸⁹ How many Americans under 25 have a White Page Directory listing? Now ask how many identify themselves through Facebook, or MySpace or both? Does each social network appearance need to be identical? No. Compare the usefulness and control that person has over identity applications like MySpace when compared to a 10-digit geographically tied down telephone number.

⁹⁰ For more on Group Forming Networks, see David Reed's links at <http://www.reed.com/dprframeweb/dprframe.asp?section=gfn>

1 networks. This allows for the balanced treatment of understanding legacy point-to-point POTS
2 communications vis-à-vis novel point-to-point IP communications such as Skype.

3 This treatment allows us to understand more fully the technological chilling effect and
4 consequent loss of economic and social value that would result if AT&T is allowed to continue
5 to advance its policies, and to compel GFNs to pay usage "toll" to interact with the PSTN. In
6 fact, Skype serves as but one an example of a negatively-affected GFN.⁹¹ Skype-type voice
7 communications would be practicably prohibited from working with the PSTN.⁹² More
8 importantly from a regulatory point of view, failure to keep AT&T in check would allow AT&T
9 to arbitrage and co-opt the underlying technology and positive network effects as if AT&T itself
10 had created them. This would not be the first time that AT&T has advanced that strategy to kill
11 competition and technical innovation until it could control it. In essence, doing nothing allows
12 AT&T to abuse its position of controlling the PSTN to control the adoption and use of new
13 technology, stifling innovation and invention.⁹³

14 Fortunately, the FCC has already addressed this exact issue, at a time when AT&T was
15 still a regulated monopoly. The FCC created and implemented the Enhanced Service Provider
16 Exemption which exempted new technology companies from being under the control of the
17 monopolist by allowing those companies *not* to pay access charges. Fortunately again for this
18 case, WCC and AT&T specifically arbitrated the implementation of the ESP exemption in our

⁹¹ Such a request makes one question the wisdom of allowing Humpty Dumpty (read AT&T) to be put back together again.

⁹² AT&T's current treatment of "Skype" like traffic is to charge it at a rate 7 times greater than "Vonage" type traffic.

⁹³ Consider Bell control and deployment, or reluctance to deploy DSL technology, mobile technology, VoIP technology, unless and until it became clear that Bell would not cannibalize existing revenue streams and would be allowed to control the genie without threat of competition.

1 ICA. AT&T's current strategy is, in essence, to pretend that the ESP exemption was not intended
2 to apply to Internet voice traffic.⁹⁴ The FCC made it clear recently in the *Time Warner Case*, and
3 as Chairman Martin and the other Commissioners have repeatedly opined, that the FCC supports
4 competition from alternative business models, especially when those business models are crafted
5 with "good public policy" in mind. A public policy that supports technological innovation and
6 invention and protects and enhances the positive network effects and benefits to society brought
7 about by Group Forming Networks is such a policy.

8 UTEX is requesting that this Commission stop AT&T from trying to impose interstate or
9 intrastate access charges on IP-to-PSTN traffic that comes through UTEX's IGI-POP services.
10 We designed our IGI-POP product exclusively for new technology providers who are not
11 carriers. AT&T is simply trying to treat all new technology traffic that utilizes our service as
12 ordinary IXC traffic for its own financial gain and to harm not only its competitors but also
13 society by preventing users from forming their own natural groups and from controlling their
14 identity.

15 Competition, at its core, relies upon user choice. Users have the right to use new
16 technology which does not need or finds useful a 10 digit geographical number.

17 **Q: IS SEEMS QUITE BOLD FOR AT&T TO TRY AND REGULATE UTEX.**

18 A: Yes it does. It is a most brazen attempt by AT&T to limit competition. However, this is
19 exactly what AT&T is attempting to do. AT&T's requests for admissions in the federal court

⁹⁴ As further described in this petition, UTEX has diligently worked within the confines of the current law and the ESP exemption from its inception in 2000, when its founders got AT&T (then SBC) to agree to "No compensation due for all traffic to or from ESPs." For more than five years now, we have been attempting to arbitrate and modernize the signaling, routing and rating of all new technology traffic, and have yet to have an actual hearing to resolve these issues on a going forward basis. Further, no such hearing to establish clear new rules on signaling, routing and rating is in sight.

1 case show this to be clear. Collectively, AT&T's answers for the first time specifically
2 characterize each and every sort of Internet voice traffic, from Skype, to Vonage, to Xbox users,
3 as all being subject to ordinary access charges under the nearly hundred year old "Exchange
4 Access" long distance regime. While the specifics over how UTEX has been historically
5 damaged by the AT&T breaches of our contract are described above; there can be no doubt now
6 that UTEX needs this Commissions help now to prevent further market damage to the industry
7 and to UTEX.

8 **Q: DOES THIS CONCLUDE YOUR TESTIMONY?**

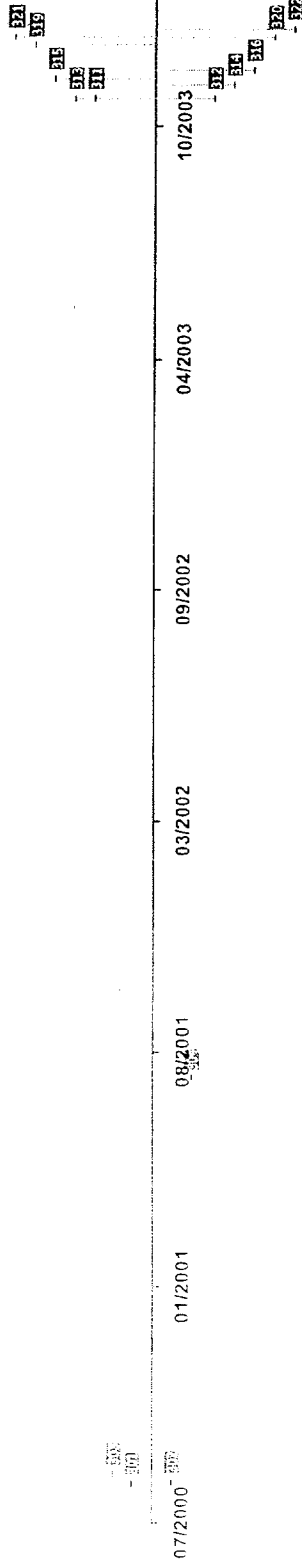
9 A: Almost. I have one more thing to say. In 1997 and 1998 SBC argued that "Internet traffic
10 is not local traffic...WCC is attempting to classify toll traffic as local traffic and undermine the
11 basis for access charges." The Commission carefully listened and then ruled against SBC. The
12 direct result is language that states "Local traffic includes traffic to or from enhanced service
13 providers."

14 Ten years ago SBC lost. For the last six years they have pretended like they won and
15 have been successful in keeping UTEX away from a hearing on SBC/AT&T's brazen disregard
16 for the ICA. I am still wondering if I will get a hearing in November of 2007.

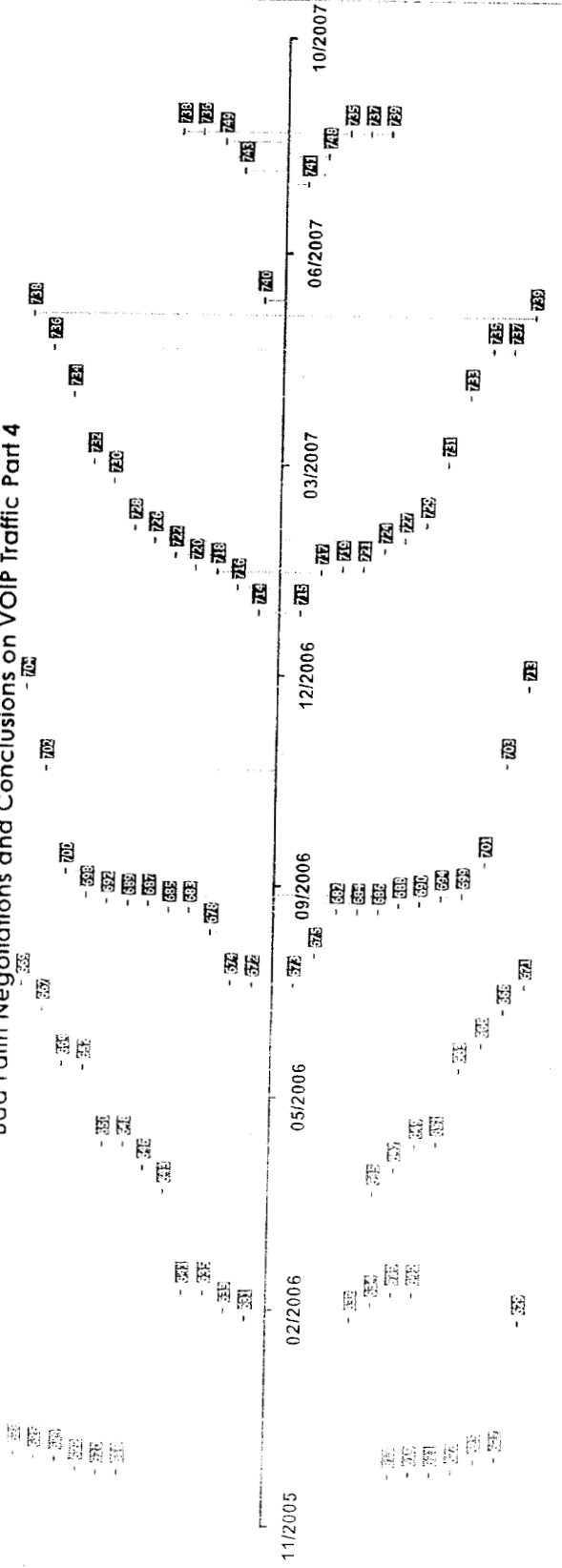
17 Below is the final pictorial timeline which details out the many failed attempts (on our
18 side) to simply achieve the clearly arbitrated and negotiated result from our ICA. This must be
19 bad faith on AT&T's behalf.

20

Bad Faith Negotiations and Conclusions on VOIP Traffic Part 1



Bad Faith Negotiations and Conclusions on VOIP Traffic Part 4



**CD WITH FILE
ATTACHED**

APPENDIX C

**Pre-Filed Direct Testimony of Soren Telfer in Texas PUC Docket No. 33323 dated
October 15, 2007**